IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

THOMAS D. AIKEN, TILLIE DAVENPORT, LILLIAN H. ESSIG, PAUL FETCHENEROWSKI, ELLA A. GALLAGHER, JOHN WILLIAM HAM, E. MORTON INGRAHAM, ADA L. JAMES, JUNEA W. KELLY, PETER J. McARRON, JOHN W. OSBORN, AUGUST H. PETERSON, VICTOR A. RASMUSSEN, GUS H. TESSMAN, C. J. UNGS, JEFFERSON D. WALTERS, JOHN P. YOUNG, FRANK S. PIPER, CHARLES P. BECKER AND BERTHA D. WILLIAMS,

Plaintiffs-Petitioners,

vs.

SAMUEL INSULL, JR., PHILIP J. McENROE, JOHN F. GILCHRIST, EDWARD J. DOYLE, JOHN G. GULICK, GEORGE F. MITCHELL, MARSHALL E. SAMPSELL, STUYVESANT PEABODY AND HARRY L. STUART,

Defendants-Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The District Court for the Northern District of Illinois, Eastern Division, filed on January 31, 1940, a Memoranda of Holdings (not reported) (R. 290).

The opinion of the Court of Appeals for the Seventh

Circuit was filed on August 22, 1941 and is reported in 122 Fed. (2d) 746. It also appears in the record herein (R. 352).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by an Act of February 13, 1925, c. 229 (28 U. S. C. A. Sec. 347). The decree of the Court of Appeals which petitioner seeks to have reviewed was entered August 22, 1941 (R. 364). Petitions for Rehearing were denied on October 1, 1941 without opinion (R. 461).

STATEMENT OF THE CASE.

The important facts necessary to an understanding of the issues argued in this brief are set forth in the foregoing Petition for Writ of Certiorari under the heading "Statement of the Matters Involved" and the statement therein contained is hereby made a part hereof.

SPECIFICATIONS OF ERRORS.

The lower courts erred in sustaining defendants' motion for summary judgment in respect to the cause of action based on the wrongful pledges to certain banks of the assets of I.U.I.

The Circuit Court of Appeals erred in holding that the Illinois courts have in tort cases refused to apply the rule universally followed in Illinois in contract cases, namely, that the court will give effect to language of a release manifesting an intent to preserve the cause of action against others jointly liable, and in holding that in Illinois such rule is limited to contract cases.

If this Court should grant the prayer of this Petition for Writ of Certiorari, petitioner intends to urge as additional errors the other findings, conclusions, rulings and orders of the lower courts which are adverse to the plaintiffs in regard to the matters and questions set forth in the foregoing Petition under the heading "The Questions Presented" (*ante*, pp. 7-10).

ARGUMENT.

I.

Under Illinois Law the So-Called Settlement by the Debenture Holders With the Pledgee-Banks Coupled With the Reservation of the Cause of Action by the Debenture Holders Against the Defendants Did Not Operate to Release the Defendants.

The decision of the Court of Appeals on this important cause of action is based on a misapprehension of Illinois law and is in conflict with applicable local decisions. The Court of Appeals said (R. 352, 355):

> "They (the defendants) rely on the strict common law principle that a release to one of several joint tort-feasors is a release to all, irrespective of the intent. Unquestionably this technical rule of release, as applied to joint wrongdoers, is followed in Illinois. *Wallner* v. *Chicago Traction Co.*, 245 Ill. 148; *Gilbert* v. *St. Louis, S. & P. R. R.*, 220 Ill. App. 51; *Stanley* v. *Leahy*, 87 Ill. App. 465."

Later in this brief (*post*, pp. 27 to 30), we shall point out that the court misapprehended the holdings of the three cases cited by it and that those cases are not germane.

The opinion proceeds (R. 356):

> "We take it, however, that the harsh rule as to a release of one joint tort-feasor does not prevail in the contract cases. *Parmelee* v. *Lawrence*, 44 Ill. 405; *Nickerson* v. *Suplee*, 174 Ill. App. 136. According to the Parmelee formula, if there is language in the release of a joint debtor manifesting an intent to preserve the releasor's rights against the other co-obligors, effect is given to this manifestation. Strange though it may seem, the Illinois courts have not seen fit to extend this wholesome and commen sense formula to the tort cases. We fail to see a good reason for

drawing this distinction between joint tort-feasor cases and joint debtor cases, compare *Brown* v. *City of Cambridge,* 85 Mass. 474, 477, but we must accept the limitation fixed by the Illinois courts."

The Court of Appeals further said (p. 752):

"We need only add, on the strength of our case-law analysis made earlier in the opinion, that the Parmelee formula is not applicable in tort cases. Hence, we are compelled to conclude, as did the District Court, that the reservation of the cause of action against the former directors of I.U.I. was void because repugnant to the operation of the release. We believe, as do the plaintiffs, that Section 885 of the Restatement of the Law of Torts (1939), which has modified the Illinois rule of release, is the superior view in these matters, but our task is to apply the local law, not the Restatement."

There was no need for the Court of Appeals to apply an admittedly "harsh," "technical" rule to this case. The rule which the Court of Appeals felt compelled to apply to this case is not the Illinois rule. There is no Illinois case holding that a release to one of several joint tort-feasors is a release of all, when there is express reservation by the releasor of his cause of action against the other tort-feasors.

The leading case on the subject in Illinois is that of *Parmelee* v. *Lawrence,* 44 Ill. 405, decided in 1867. The instrument involved in that case recited that Lawrence had received a certain amount of money from Bigelow, one of four joint obligors, "in full payment of his portion of all money due me" (p. 408), and it further stated:

"and I release and discharge said Bigelow, his property and estate, from all claims on account of the same."

It then provided (p. 408):

"Nothing herein contained shall in any wise affect my rights or demand against said Parmelee, Gage or Johnson, or their interest in said property."

The court considered the earlier Illinois cases of *Benjamin* v. *McConnell, et al.*, 4 Gilman 536, and *Rice* v. *Webster*, 18 Ill. 331, which involved the construction of instruments similar to the one in *Parmelee* v. *Lawrence*. In both of those cases, it was held that the instruments should be construed to release the others jointly liable, and that the words of reservation were repugnant to the release. The court in *Parmelee* v. *Lawrence*, 44 Ill. 405, overruled those cases and said (p. 413):

> "We would further add that the weight of the modern authorities is against these cases, and in favor of the more reasonable rule, that where the release of one of several obligors shows upon its face, and in connection with the surrounding circumstances, that it was the intention of the parties not to release the co-obligors, such intention, as in the case of other written contracts, shall be carried out, and to that end the instrument shall be construed as a covenant not to sue."

Parmelee v. *Lawrence* has been cited and approved in many other jurisdictions. Without any exception or limitation whatever, it has been universally followed in all Illinois cases involving releases containing reservations as to others jointly liable, as appears in the following Illinois cases:

City of Chicago v. *Babcock*, 143 Ill. 358, 367.
Dupee v. *Blake*, 148 Ill. 453, 465.
Moore v. *Stanwood*, 98 Ill. 605, 608.
Mueller v. *Dobschuetz*, 89 Ill. 176.
Lumberman's Ins. Co. v. *Preble*, 50 Ill. 332, 335.
Forster v. *Sheridan Trust & Savings Bank*, 257 Ill. App. 463, 472.
Van Meter v. *Gurney*, 251 Ill. App. 184, 186.
Rice v. *Barkman*, 249 Ill. App. 127, 130.
Wallace v. *Armstrong*, 236 Ill. App. 457, 460.
Nixon v. *City of Chicago*, 212 Ill. App. 365, 387.
Miller v. *Lloyd*, 181 Ill. App. 230, 246.

Nickerson v. *Suplee*, 174 Ill. App. 136, 139.
Skinner v. *Sullivan*, 127 Ill. App. 657, 663.
Clark v. *Mallory*, 83 Ill. App. 488, 492, aff'd. 185 Ill. 227.
Thomason v. *Clark*, 31 Ill. App. 404, 407.

That the Illinois courts follow the same rule of determining the intention of the parties in regard to releases given in tort cases is made clear by *City of Chicago* v. *Babcock*, 143 Ill. 358, in which it appeared that the plaintiff was injured by reason of a defective sidewalk under circumstances making the City and LeCardi joint tort-feasors. The City claimed that when plaintiff gave to LeCardi an instrument reciting (p. 364):

> "that no action shall be begun against Joseph LeCardi, by reason of any matters existing at this date, by the undersigned. Given for good consideration,"

she received the money mentioned in the instrument in full satisfaction of her cause of action against LeCardi, and that thereby the suit against the City was barred. The trial court submitted to the jury the question as to whether the $150 was received by the plaintiff in satisfaction of her injuries and instructed the jury that if they should find that it was so received by her, then their verdict should be for the City. The verdict was for the plaintiff.

The Supreme Court said (p. 366):

> "It is thus seen that it was fairly left to the jury to determine, as a question of fact, whether or not the money received by appellee was received by her in satisfaction of the injuries that she had sustained."

The court, after citing the Illinois case of *Parmelee* v. *Lawrence* and other cases holding that the intention of the parties controls, concluded that there was no error in law in view of the fact that (p. 367):

> "the question whether there was an accord and satisfaction, and whether the $150 was paid and received in

> satisfaction of damages, was submitted to the jury, to be determined by them in the light of all the facts and circumstances shown by the evidence."

In other words, in line with *Parmelee* v. *Lawrence*, 44 Ill. 405, the court held that in this suit, involving joint tort-feasors, the sole question to be determined was the intention of LeCardi and the plaintiff.

That the technical rule of release should not be extended is stated in *Moore* v. *Stanwood*, 98 Ill. 605, 608:

> "This court, in *Parmelee* v. *Lawrence*, 44 Ill. 405, held that the technical rule by which a release of one joint debtor is made to operate as a discharge of all, is not to be extended to cases not within the reason and equity of the rule."

The court in *Clark* v. *Mallory*, 83 Ill. App. 488, 492 (affirmed 185 Ill. 227), in referring to the rule expressed in *Parmelee* v. *Lawrence* and to a reservation in the instrument, said:

> "Where such right is reserved, the release will be construed as a covenant not to sue, leaving the liability of the co-obligors unimpaired."

The foregoing discussion should make it clear that the Court of Appeals misapprehended the Illinois law and that the so-called release of the banks did not release the defendants.

However, if it should be believed that because the Illinois courts have never decided, one way or another, the effect of a so-called release with reservation clause in tort cases and that therefore the Circuit Court of Appeals was called upon to fill the gap, then the Court of Appeals should have applied what it recognized as the Illinois rule in contract cases, which it found to be completely analogous, and which it considered to be the general and superior view adopted by other jurisdictions and by the Restatement of the Law of Torts. An excellent discussion of this proposition is found in the opinion of the Court of Appeals

in this case (R. 352); the Court refused to follow the dictates of its conscience only because of its misapprehension of Illinois law, as above pointed out. That the Court of Appeals was correct in its understanding of what the general rule is in other jurisdictions is indicated by the following leading cases of other jurisdictions:

Gilbert v. *Finch*, 173 N. Y. 455, 66 N. E. 133.

Dwy v. *Connecticut*, 89 Conn. 74, 92 Atl. 883.

Carey v. *Bilby*, (C. C. A. 8) 129 Fed. 203.

Black v. *Martin*, 88 Mont. 256, 292 Pac. 577.

Colby v. *Walker*, 86 N. H. 568, 171 Atl. 774.

Carpenter v. *W. H. McElwain Company*, 78 N. H. 118, 120, 97 A. 560, 561.

Edens v. *Fletcher*, 79 Kans. 139, 98 Pac. 784.

Kropidlowski v. *Pfister & Vogel Leather Co.*, 149 Wis. 421, 135 N. W. 839.

Duck v. *Mayeu*, 2 Law Rep. Queen's Bench Div. 511, 513.

Adams Express Co. v. *Beckwith*, 100 Ohio St. 348, 126 N. E. 300.

Feighley v. *C. Hoffman & Son Milling Co.*, 100 Kan. 430, 165 Pac. 276.

City of Topeka v. *Brooks*, 99 Kan. 643, 164 Pac. 285.

El Paso & S. R. Co. v. *Darr*, 93 S. W. 166.

Pennington v. *Bevering*, 9 S. W. (2d) 401.

Bland v. *Lawyer-Cuff Co.*, 72 Okla. 128, 178 Pac. 885 (1919).

Mahaffey v. *Glover*, 184 Ark. 1159, 45 S. W. (2d) 521.

Roseville Trust Co. v. *Mott*, 85 N. J. Eq. 297, 96 Atl. 402.

LaMonte v. *Lurich*, (N. J.) 100 Atl. 1031.

Greenhalch v. *Shell Oil Co.*, 78 F. (2d) 942 (C. C. A. 10).

See also:

25 California Law Review 413 (1937).
13 Cornell Law Quarterly 473 (1928).
22 Minnesota Law Review 692 (1938).
Mich. Section 1 (Suppl. Mich. L. Rev.) 23 (1935).
34 Harvard Law Review 442 (1921).

The Restatement of Torts (1939) Section 885, referred to by the Court of Appeals with approval, states the rule as follows:

> "(1) A valid release of one tort-feasor from liability for a harm, given by the injured person, discharges all others liable for the same harm, unless the parties to the release agree that the release shall not discharge the others and, if the release is embodied in a document, unless such agreement appears in the document."

In its "Comment" on this rule, the Restatement states, in referring to the earlier common law rule that a release of one joint tort-feasor discharges the others irrespective of the intent of the parties, as follows:

> "It frequently resulted in the unintended and unpaid-for discharge of one of the tort-feasors. The rule is not consistent with the modern American point of view."

The Restatement goes on to state:

> "Furthermore the tendency is to give effect to the intent of the parties to a transaction rather than to regard as controlling the formalities with which the transaction is executed. The law has now developed so that it is possible to carry out the intent of the parties as expressed in the document by which the release is given. * * *
>
> If, however, there is language in the release which manifests that the releasor intended to preserve his rights against the others, effect is given to this manifestation."

In our petition for rehearing filed in the Court of Appeals we challenged the defendants to cite a single case

of the Supreme or Appellate Courts of Illinois deciding that in spite of a clause in a release reserving the cause of action against the other joint tort-feasors, the reservation clause will be given no effect and the other joint tort-feasors will be released, and we now repeat that challenge. The defendants answered our petition for rehearing but were unable to meet our challenge.

We are certain that no case can be found to support the rule which the Court of Appeals believed is followed in the courts of the State of Illinois.

Not a single one of the three cases cited by the Court of Appeals in support of the alleged Illinois rule is in point. While the subject of "intention" may, in one way or another, be involved in these cases, in no case did the facts disclose an expressed intention by the releasor and releasee or an agreement between them to reserve the releasor's cause of action against the other joint tort-feasors—which facts are found in this case.

In the first case cited by the Court of Appeals, *Wallner* v. *Chicago Traction Co.*, 245 Ill. 148, there was no reservation of the cause of action against the other joint tort-feasor and there was no written release. The facts concerning the alleged discharge of the defendant were disclosed during the examination of the plaintiff when he testified that he received $1,000.00 from the other joint tort-feasor and had no further claim against it. The Court said that "the only question presented on this appeal is whether there was an accord and satisfaction" between the plaintiff and the other tort-feasor (p. 150). That the court might have held otherwise if the plaintiff had been able to show that he reserved his cause of action against the defendant is indicated by the following language (p. 151):

> "If the facts of the payment and acceptance of this sum, the dismissal of the suit against the rail-

road company, and the statement of the defendant in error that he had no further claim against it, are capable of another construction, the burden of furnishing the explanation or qualification which would give them a different effect was upon the defendant in error."

In the second case cited by the Court of Appeals, *Gilbert* v. *St. Louis S. & P. R. R.*, 220 Ill. App. 51, the plaintiff did not reserve his cause of action against the defendant when he released the other joint tort-feasor. The release introduced in evidence was a release of both the defendant and the other joint tort-feasor but the plaintiff contended that the name of the defendant was not in it when he executed it. The court held that it made no difference whether or not the name of the defendant was included in the written release at the time of its execution because even though the defendant had not been specifically named as a releasee in the written release, the release of the other joint tort-feasor operated to release the defendant. The court simply applied the general rule applicable to unqualified releases. How can that case be determinative of the issue in this case in view of the fact that in that case there was no expressed reservation in any form of the plaintiff's cause of action against the other joint tort-feasor?

The last case cited on this point, *Stanley* v. *Leahy*, 87 Ill. App. 465, is likewise not germane. That case involved the sufficiency of a pleading in which the plaintiff claimed that when she released the other joint tort-feasor, she did not intend to release the defendants. There was nothing to indicate, however, that the plaintiff expressed or communicated to anyone in any way her intention not to release the defendants. Of course, so long as the plaintiff's intention was not communicated to the releasees and was not an expressed condition under which the payment was made, it could have no legal significance. That is

even the rule in the contract cases which follow the *Parmelee* formula (See *Clark* v. *Mallory*, 185 Ill. 227). Can *Stanley* v. *Leahy* be compared to our case in which it is perfectly clear that the plaintiffs and the banks, as well as the District Court approving the so-called settlement, definitely expressed their intention to reserve to the plaintiffs their cause of action against the defendants and the so-called settlement with the banks was made subject to that condition?

If the three cases relied upon by the Court of Appeals for its decision that the Illinois courts treat tort cases differently from contract cases had been contract cases, and accordingly within the scope of the *Parmelee* formula, they would have been decided in the same way as they were. In the absence of any expressed reservation as a part of the so-called release of the releasor's cause of action against the other persons jointly liable, the *Parmelee* rule is inapplicable, whether the case be in contract or tort. That demonstrates how different those three cases are from this one and how they cannot be said to indicate that the Illinois courts have refused to extend the *Parmelee* rule to tort cases. These three cases constitute the entire basis for the refusal of the Court of Appeals to follow the approved rule laid down in the *Parmelee* case. Since the Court erred in its interpretation of those cases, and was convinced that the *Parmlee* formula ought to apply, this Court should rectify the error.

A case frequently relied upon by defendants is that of *Petroyeanis* v. *Pirola*, 205 Ill. App. 310, but this case was, in effect, overruled in *Van Meter* v. *Gurney*, 251 Ill. App. 184.

We reiterate that any cases which the defendants will cite in response to our challenge will be as little in point as the three cases relied on by the Court of Appeals and analyzed above. An Illinois case is not determina-

tive of this case unless its facts are similar to the facts in the instant case. We have perused every reported Illinois case on the subject and are certain that the Illinois courts have never been presented in a tort case with an instrument of release which included a reservation of the cause of action against the other tort-feasors. Inasmuch as no reservation clause has ever been a part of the facts in any Illinois case involving a release of tort liability, how can it be said that the Illinois courts have decided that such reservation clauses shall be given no effect in tort cases?

There is no basis for concluding that the Illinois rule in tort cases is any different from its rule in contract cases. There is no Illinois case holding that the principle of the *Parmelee* case is not applicable to tort cases or limiting the *Parmelee* rule to contract cases. A written release, settlement agreement or written accord and satisfaction, like every other written instrument, is subject to construction and one of the cardinal rules of construction is that written instruments must be so construed as to carry out the intention of the parties. There is no rule of law to the effect that written instruments executed in connection with tort cases should be construed without reference to the intention of the parties. In *Reams* v. *Janoski*, 268 Ill. App. 8, the court was faced with a simple unambiguous release, containing no reservation clause or any other language indicating an intention to reserve the cause of action against the defendant, and yet the court held that parol evidence could be introduced to show that the plaintiff and the other tort-feasor intended to enter into a covenant not to sue and to reserve the plaintiff's cause of action against the defendant.

If this point were presented to the Illinois courts, they would unquestionably hold that the *Parmelee* rule applied to tort cases. Hence, a grave injustice to the debenture

holders was committed by the Court of Appeals in failing to follow the applicable local decisions and in deciding this case on an admittedly "harsh" rule. We entreat this Court to correct the error and apply the "superior view" and the "wholesome and common sense formula" which has been adopted by the Illinois courts and which is the prevailing rule followed by the other state courts and adopted by the Restatement of the Law of Torts.

II.

By Virtue of the Fact That the Suits Against the New York Banks Had Resulted in Judgment for the Banks at the Time of the So-Called Settlement With the Banks, the Debenture Holders Had No Cause of Action Against the New York Banks at the Time of the So-Called Settlement and Hence, to the Extent of the Pledges to the New York Banks, There Was No Basis for Invocation of the Alleged Rule That the Release of the Cause of Action Against One Joint Tort-Feasor Releases the Entire Cause of Action.

Assuming, for the sake of argument only, that all other points on which we rely are held adversely to our contentions, our position is that in no event were the directors discharged from liability in connection with the pledges which they induced to be made to the New York banks and General Electric Co.

The Court of Appeals apparently overlooked and did not pass upon our argument that the alleged rule (that the release to one of several joint tort-feasors releases all, irrespective of an express clause reserving the cause of action against others), cannot be applicable in this case in respect to that portion of the cause of action relating to the pledges which were wrongfully made to the New York banks. At the time the so-called settlement with the banks

was made, the suits by the debenture holders against the New York banks arising out of the wrongful pledges had been dismissed by the District Court at New York and the alleged cause of action merged and extinguished in the decrees of dismissal. There remained no cause of action in the debenture holders which could be the subject of a release. All that the New York banks could obtain from the debenture holders was a dismissal of the appeal from the decree in favor of the banks and that was all that the plaintiffs agreed to or did furnish in the settlement papers (R. 143, 160, 167).

The Court of Appeals in this case observed that in the case of *Van Meter* v. *Gurney,* 251 Ill. App. 184, an exception was made in tort cases to what this Court understood the Illinois rule to be and pointed out that in that case the court justified the application of the *Parmelee* rule of construction to a release given to one of two joint tort-feasors after judgment on the theory that "the claim in tort is merged into the judgment which is a debt" (p. 187). The instant case, in respect to the cause of action for wrongful pledges with the New York banks, calls for the application of the same exception to the alleged rule because upon dismissal of the New York bank cases, the plaintiffs' claim in tort, if it be considered a claim in tort, was merged into the judgment and was thereby extinguished. While this point does not apply to the cause of action for the pledges to the Chicago banks, those cases never having been tried, it should be clear that the debenture holders, at the very least, have not released their cause of action against the defendants for the pledges to the New York banks.

III.

The Defendants and the Pledgee-Banks Were Not Joint Tort-Feasors in Connection With the Pledging of the Assets of I. U. I. and Consequently There Was No Basis for the Application of the Alleged Rule That the Release of One Joint Tort-Feasor Releases All.

Even assuming for the sake of argument that the causes of action against the defendants and the banks were in tort, there would be no grounds for the application of the supposed rule that the release of one joint tort-feasor releases all unless the defendants and banks were *joint* tort-feasors in respect to the wrongs complained of.

The statement of facts should make it clear that although the suits against the banks and defendants are based on substantially the same set of facts, the causes of action against each were of a different nature, the theories were different, the charges were different and the defenses are bound to be different. The ruling of the Court of Appeals on this point is in conflict not only with the decisions in the litigation against the banks but also with decisions of this Court and of the State of Illinois as well as those of other jurisdictions (See Petition, *ante*, pp. 13-15). The Court of Appeals disposes of the point by the following reasoning (R. 355):

> "In our view the banks have contributed substantial assistance to the directors in the production of the resulting tort. According to Illinois law, 'It is enough if they were both liable for the same injury,' *Chapin* v. *Chicago & E. I. R. Co.*, 18 Ill. App. 47, 50, and neither conspiracy nor concert of action is necessary. We agree with the District Court's expression that 'The joint action of each was necessary to the consummation of the wrong.'"

The only case relied upon by the Court of Appeals, that of *Chapin* v. *Chicago & E. I. R. Co.*, 18 Ill. App. 47, is not

applicable because the injury in that case clearly arose out of the joint negligence of both railroads.

A strictly analogous case is that of *Veazie* v. *Williams*, 49 U. S. 134, in which it appears that the owners of certain property being sold at auction instructed the auctioneer to puff the price by fictitious bids. In a suit by the purchaser against the owners for fraud, the owners claimed that they were released by virtue of an unqualified release given by the purchaser to the auctioneer. This Court, in refusing to discharge the owners, held that the owners and the auctioneer were not jointly liable even though the action of each was necessary for the consummation of the wrong. This court said (p. 159):

> "Again, in the present instance, there was no joint liability at law by the respondents and the auctioneer. Their accountability was separate and resting on different grounds; his on actual falsehood—theirs on the adoption of the benefits of it, and the accountability thus arising for it. The release of one, therefore, is not like the release of a joint contractor or joint trespasser, 1 Anstruther, 38. And in equity it may well be limited to the person released, and the person paying the consideration for it. Hopkins, 251, 334."

In *People* v. *Becker*, 253 Ill. 131, the State Auditor who wrongfully drew state warrants and the State Treasurer who wrongfully paid the warrants were held not to be joint tort-feasors, so that a release to the State Auditor did not release the State Treasurer. The court said on this point (p. 137):

> "It is next contended the Auditor and Treasurer were joint tort-feasors, and as the State had accepted the amount of the Pavey judgment from Pavey and his bondsmen and released Pavey, such release worked a discharge of the Becker estate, Becker having been a joint tort-feasor with Pavey. The Auditor and Treasurer were not joint tort-feasors. (*Whittemore* v. *People*, 227 Ill. 453.) Their acts were not joint acts. The wrongful act of Pavey was in drawing the warrants

> and the wrongful act of Becker was in paying them, and whatever liability the law attached to their several acts was a distinct and separate liability, which could be enforced against them, or them and their bondsmen separately."

In *Scharfenstein* v. *Forest City Knitting Co.*, 253 Ill. App. 190, 202 (cert. den. Ill. Sup. Ct.), it was held that the rule in respect to release of joint tort-feasors had no application where a release was given to an interstate railroad by which the deceased was employed when its liability was regulated by the Federal Employers' Liability Act and the subsequent suit was under the State Wrongful Death Statute against a local factory which contributed to the injury. The court pointed out that the liabilities arose under different laws, giving different rights and causes of action, and that the two tort-feasors could not have been joined in the same action under the Federal Act.

It should be evident that the wrongs committed by the banks and directors in connection with the pledges are distinct and separate. The directors caused I.U.I. to make the pledges, while the banks without any inducement or fraud received them under circumstances which imposed on them only a possible liability to share their security with the debenture holders. The directors owed a duty to the debenture holders, while the banks were strangers to the debenture holders. Although it took the action of both the directors and the banks to effect the pledges, it cannot be said that the pledges resulted in the commission of a joint tort by the directors and banks.

Conclusion.

We shall not extend this brief by arguing all the questions presented and reasons relied on for the issuance of the writ which are set forth in the foregoing petition. Sufficient has been said, we submit, to warrant the issuance

of the writ of certiorari to correct the errors made by the Court of Appeals in failing to adopt applicable local decisions and thereby in depriving the debenture holders of an important cause of action.

Respectfully submitted,

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ROGER Q. WHITE,
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